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No. 87-199

In The
Supreme Court of the United States
October Term, 1987

STATE OF IDAHO,

Respondent,

MEMBERSHIP OF HEYBURN STATE PARK LEASEHOLDERS ASSOCIATION,

Intervenor/Respondent,

vs.

THE COUER D'ALENE TRIBE OF INDIANS,

Petitioner.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent State of Idaho and Intervenor/Respondents Membership of Heyburn State Park Leaseholders Association file this joint brief in opposition to the Petition of the Coeur d'Alene Tribe of Indians for a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Ninth Circuit dated April 9, 1987. The Ninth Circuit's Opinion is reported at 814 F.2d 1288 (9th Cir. 1987).

RESPONDENT'S STATEMENT OF THE CASE

Respondents submit the following material in supplementation and, where noted, correction of the Tribe's statement of the case. The genesis of Heyburn Park was in the Coeur d'Alene Allotment and Settlement Act of 1906, 34 Stat. 335, III Kapler 204, which opened portions of the Coeur d'Alene Reservation to homesteading. Various parties, including the Coeur d'Alene Tribe, were concerned that a particularly beautiful area of lakes and forests within those ceded lands would pass into private ownership as a result of allotment and settlement. There were some attempts in Congress to make these lands a federal park, but funding concerns led to authorization for a state park.

The Heyburn Act "reserved and withdr[ew] from allotment and settlement" 6,774.65 acres from the lands subject to disposition under the Act of 1906. These lands were subsequently patented to the State of Idaho to be maintained as a public park. The patent states that "the purchase price to be paid by the State of Idaho for the said lands has been fixed at $11,379.17." The patent also recites that this purchase price was determined "by appraisement under direction of and approved by the Secretary of the Interior . . . ." The proceeds of the sale were deposited in the United States Treasury for the benefit of the Tribe. (Petitioner's Appendix Exhibit ["Pet. App. Exh."] V & VI).

When the patent was issued, there were approximately 200 floathomes and several summer cabins leased to private parties within the proposed park lands. Immediately after purchase, these lands were established as

Heyburn Park. 1911 Idaho Sess. Laws, Ch. 89, §§ 1-2, p. 335 (See Pet. App. Exh. X). The State of Idaho has continued the practice of leasing floathomes and summer cottage sites by issuing ten-year renewable leases to private parties, with the most recent leases issued in 1983. Less than ½ of 1 percent of the park lands were ever leased to private parties. From 1972 on, the leases included a public right of ingress and egress to and from the adjoining beach. *State of Idaho v. Hodel,* 814 F.2d at 1291 n. 2. In 1975, the Idaho Legislature specifically authorized and ratified existing cottage site leases and imposed public health and planning restrictions on any new cottage site leases. (Pet. App. Exh. IX). In 1976, just before these suits were brought, there were 161 leased sites covering approximately 21 acres and 32 existing floathome permits. The cabin site leases average less than .14 acres each. *State of Idaho v. Hodel,* 814 F.2d at 1290.

Uncontradicted testimony in support of the State of Idaho's Motion for Summary Judgment established that cabin site leasing was frequently used to fund the development and maintenance of large rural public parks. Congress was keenly aware of the funding requirement of such parks and had authorized cottage site leasing in federal parks as a means of offsetting these costs. Congress' reluctance to assume more federal park costs was the very reason for granting Heyburn Park to the State. Leasing cottage sites was discussed as one means of funding a national park on the site. 59 Cong. Rec. 4592 (1907).

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SUMMARY OF ARGUMENT

Petitioner Tribe seeks forfeiture of a 75-year-old state park because ½ of 1 percent of the park's land area has been leased for summer homes. The Tribe argues that the summer home leases violate a provision of the federal patent that the land be "held, used and maintained solely as a public park." Ironically, petitioner seeks to use a condition of the park patent that was designed to protect the public as a means to remove the park from the public domain.

The petitioner's argument turns on an esoteric question of no general applicability: Whether limited leasing of summer home sites was considered a public park purpose in large rural public parks in 1911. This question was fully briefed and considered below. Because it is highly unlikely that this question will arise in any other context, this case does not merit further review. None of the three arguments raised by petitioner are persuasive. The record fully supports the finding of the district court and the Ninth Circuit that limited cottage site leasing was not viewed as inconsistent with the purposes of public parks at the time of the Heyburn Park Patent. Moreover, the leasing practice is not inconsistent with state law or policy. Finally, the Ninth Circuit correctly applied the canon of construction against forfeiture to the Heyburn Park Patent of 1911.

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ARGUMENT

I. The Ninth Circuit Correctly Decided That Cottage Site Leasing Was a General Custom and Practice in Public Parks in the First and Second Decades of the Twentieth Century.

The United States Court of Appeals for the Ninth Circuit adhered to the established rules in construing ambiguous or vague provisions in a statute or patent. The Court held that the intention of the parties at the time of the transactions governs interpretation and that undefined terms will be given their ordinary, commonly understood meaning, *Perrin v. United States*, 444 U.S. 37, 42 (1979). The Tribe's Petition does not argue that the intent of the parties should be judged in light of modern notions of public park use.

The record fully supports the district court's and the Ninth Circuit's determination that cottage site leasing was a general custom and practice in public parks when Heyburn Park was created. The parties exhaustively reviewed the history of public park leasing practices before the trial court. Hundreds of pages of affidavits and depositions were submitted on the issue. The district court judge viewed the sites. (Pet. App. Exh. III at p. 48). Both the district court and the Ninth Circuit's decision were well-considered and based on a full airing of the facts; petitioner has cited no authority to the contrary.

Given that leasing was regarded as a means of funding large rural parks, Statement of Facts, *supra* at p. 2, it is reasonable to infer that Congress would not have disapproved of cottage site leasing as a means of easing

the state's financial burden in managing the park. The prevalence of similar leasing arrangements and Congress' recognition of park funding problems mean that the Heyburn Act and Heyburn Park Patent's failure to address cottage site leasing should not be read as a prohibition.

The petitioner attempts to support its position by explaining that cottage site leasing in Glacier, Lassen, and Mackinac Island National Parks was specifically approved by Congress. This fact is not helpful to the Tribe. Concepts of fairness led the State of Idaho to believe that cottage site leasing would be permissible in state parks as well. Even if Congress chose to expressly approve certain cottage site leases, the petitioner has cited no authority that even suggests that Congress considered cottage site leasing to be impermissible absent specific authorization.

The petitioner contends that the right of reentry reserved by the United States distinguishes this case from other instances of cottage site leasing in federal parks. Yet, the petitioner has failed to explain how the existence of a right of reentry could operate to change then-prevailing notions of permissible public park uses.

Petitioner's argument that the Tribe never consented to the formation of a state park on the land in question is immaterial. When Congress passed the Coeur d'Alene Allotment and Settlement Act of 1906 and the Heyburn Act of 1908, 35 Stat. 70, 78, III Kappler 326, Congress knew that tribal consent was not required to make the Acts effective. Congress was well aware of its authority over Indian affairs as announced in *Lone Wolf v. Hitchcock*,

187 U.S. 544 (1903). *See Also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587, 588 (1977).

Finally, as the Ninth Circuit noted, "public park" is an inherently broad and flexible term. Diversity of character is inherent in the broad and flexible meaning of "public park." The Federal District Judge for the District of Idaho was given a view of the park pursuant to a stipulation. This view allowed Judge Callister to compare the cottage site leasing in Heyburn Park with the record of park uses in the early part of the century. This factual basis is necessary to a proper determination of this case, since leasing a .15 acre cabin site would be wholly inconsistent with a .25 acre modern urban public playground, but would be clearly consistent with turn-of-the-century uses of a 6,774.65 acre rural public park enclosing large lakes. Based upon this examination, the trial court determined and the Ninth Circuit affirmed that leasing less than ½ of 1 percent of Heyburn Park was consistent with the record of public park uses before them and thus, within the objective contemplation of the parties to the patent. These judgments should not be disturbed on the basis of the arguments presented by the petitioner.

II. The Ninth Circuit Correctly Interpreted Idaho Law When It Held That Leasing Cottage Sites Did Not Exceed the Broad Grant of Authority to the Idaho Department of Parks to Manage Idaho Park Lands.

The Ninth Circuit interpreted the Heyburn Act and Heyburn Park Patent with deference to the State's authority to administer and operate its state parks. The Tribe does not argue that it is inappropriate to defer to

the discretion of state park managers. Rather, the Petitioner contends that the state's discretion has been circumscribed by a statutory ban on cottage site leasing.

The State of Idaho has plenary power over its own property. *See Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976) *rehearing denied* (1976) (approving state financed construction of dam for leasing to private company). Given the broad delegation of powers to the Idaho Department of Parks (Pet. App. Exh. XI & XIII) and the ratification of existing leases prior to the time suit was brought (Pet. App. Exh. IX), state park administrators have the power to enter into cottage site leases absent a clearly expressed statutory prohibition. No express prohibition is cited by the Tribe, nor is any evident from the record. This argument provides no basis for reversing the Ninth Circuit.

Even if petitioner's argument were correct, it would not change the outcome of the case. The Ninth Circuit cited its deference to the discretion of state park administrators merely to support its analysis. *State of Idaho v. Hodel*, 814 F.2d at 1295. The violation of a state policy cannot change the parties' understanding that limited cottage site leasing was not inconsistent with the public park purposes for which the park was granted to the state. Moreover, any violation of state policy by the director is remedied by an injunction against further leasing, not by forfeiture of the entire park.

III. The Court Correctly Applied the Rule of Construction Against Forfeitures to the Heyburn Park Patent.

The petitioner argues that the canon of liberal construction in favor of Indians should be extended to a

patent between the federal government and the State of Idaho. There is no precedent or rational basis for such an extension.

The canon of liberal interpretation in favor of Indians was first developed in cases involving treaties. It was a recognition of the unequal bargaining position existing between the parties. The canon was later extended to statutes which unilaterally abrogated treaty provisions.

The various cases establish that Congress must show a "clear and plain" intent to abrogate Indian treaty rights. *See Washington v. Washington State Commercial Fishing Vessel Ass'n.*, 443 U.S. 658, 690 (1979). In the present case, the Court of Appeals applied this canon of construction to the Heyburn Act of 1908. This statute was a clear expression of Congress' intent to withdraw certain lands from Indian allotment and settlement and to grant the land to the State of Idaho for use as a public park. However, because the statute did not expressly extinguish the Tribe's beneficial interest, the court ruled that the Tribe retained a beneficial interest in any possible reversion of the land to the federal government.[1] *State of Idaho v. Andrus*, 720 F.2d 1461 (9th Cir. 1983), *cert. denied*, 469 U.S. 824 (1984).

After narrowly construing the 1908 Act in favor of the Tribe, the Ninth Circuit correctly refused to extend the rule to the 1911 patent. The patent itself abrogated no rights; divestment of the Tribe's interest in the land took

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[1] The State of Idaho and the Leaseholders have consistently asserted that the Tribe has no interest in the reversion. If the petition is granted, the issue of the Tribe's interest in the land would be subject to review.

place in the 1908 statute. The driving force of protecting Indian rights evaporated with tribal title. The patent here should be construed in light of the relationship between the parties to the patent—the State of Idaho and the United States.

There is nothing inherent in the relationship of the parties to the patent which requires departure from the rules of construction normally used to interpret land patents. Respondents concede that, as a general rule, land grants are to be construed favorably to the government. This canon of construction has been used mainly to prevent grantees from claiming mineral rights unless the patent clearly conveyed them. *See United States v. Union Pacific Railroad,* 353 U.S. 112 (1957). However, this Court's reluctance to require forfeitures of patented lands has led it to develop a contrary rule for construing conditions subsequent. If construction of the patent language could lead to a forfeiture, the applicable rule of construction is to avoid the forfeiture.

In *Oregon & California Railroad v. United States*, 238 U.S. 393 (1915), this Court refused to construe breach of a condition subsequent as a forfeiture, despite the fact that the granting act was to become "null and void" if the railroads were not completed in the time required. This Court stated:

> [W]e think the principle must govern that conditions subsequent are not favored, but are always strictly construed, and where there are doubts whether a clause be a covenant or a condition the courts will incline against the latter instruction; indeed, always construe clauses in deeds as covenants rather than as conditions, if it is possible to do so . . . . And it is a general principle that a court of equity is reluctant to

> (some authorites say never will) lend its aid to enforce a forfeiture.

Id. at 420. *See Also Choctaw and Chickasaw Nations v. Board of County Commissioners*, 361 F.2d 932, 935 (10th Cir. 1966) (construing a federal patent granting land "for cemetery purposes only" to avoid forfeiture).

The specific canon of construction against forfeitures was correctly applied by the Ninth Circuit. Any ambiguity in the 1911 patent should not be construed to defeat the expectations that have arisen over three-quarters of a century of continuous public use of Heyburn State Park. The Petitioner's argument fails to present a basis for reversing the Ninth Circuit.

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CONCLUSION

This case does not meet any of the customary tests for granting a petition for certiorari. SUP. CT. R. 17.1(a)-(c). There is no conflict between the circuits of the United States Court of Appeals. There is no conflict between the decisions of a United States Court of Appeals and a state supreme court. The case presents no legal issues of importance or general applicability.

The key question in this case is extraordinarily narrow: Whether limited cottage site leasing was viewed as consistent with the use of a large rural public park at the beginning of this century. That question was exhaustively briefed by the parties and reviewed by both the district court and the Ninth Circuit. The well-considered opinions

of these courts should not be disturbed, and the petition should be denied.

DATED this 27th day of August, 1987.

Respectfully submitted,

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